

DECISION



119055 PL-1 LUNTER
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-205710, B-205928

DATE: July 27, 1982

MATTER OF: Crystal Industries, Inc.

DIGEST:

1. Protest that the contracting agency lacked compelling reason to cancel invitation for bids (IFB) after bid opening and resolicit is untimely where initial basis for protest failed to address actual reasons the agency canceled the IFB and the protester did not challenge these reasons until after receiving the agency's protest report even though protester was or should have been aware of reasons for cancellation.
2. The protester has the burden of proving bias on the part of agency officials and where the record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation.
3. The protester has provided GAO with no reasons to question agency's determination to award a contract for the needed services during the pendency of the protest. Moreover, assuming that agency should not have made award while protest was pending, the legality of the award would not be affected.

Crystal Industries, Inc. (Crystal), protests the cancellation of invitation for bids (IFB) No. CO-25-81, issued by the Department of Justice (Justice), Immigration and Naturalization Service, for various support services, alleging that the agency lacked compelling reasons required by Federal Procurement Regulations (FPR) § 1-2.404-1 (1964 ed. amend. 121) to cancel the IFB after bid opening and that the agency was biased against Crystal. Crystal also protests the award of a contract for the services under a subsequently issued solicitation (IFB No. CO-4-82) to Guardian Storage, Inc. (Guardian Storage), during

the pendency of its protest against cancellation. Guardian Storage contends that a major portion of the protest is untimely. Justice states that the protest is for denial.

For the reasons set forth below, we dismiss the protest in part and deny it in part.

Background

Justice received nine bids, which provided unit pricing for the various categories of support services. An evaluation under the IFB's award clause resulted in a determination that Crystal submitted the lowest aggregate total of the unit prices, and Crystal was found to be responsible. However, Justice's Contract Review Committee concluded that the IFB was legally insufficient because the evaluation criteria for award were ambiguous, the estimates for the requirements were incomplete, and any award based on the aggregate of unit prices rather than the total work to be performed would be improper. Therefore, the IFB was canceled and the bidders were so notified in writing on November 20, 1981. The solicitation remedying these deficiencies and effecting other changes was issued on November 25, 1981, and bid opening occurred on December 14, 1981. Crystal was furnished the resolicitation but it failed to bid. Because of further errors in Government estimates, the resolicitation was canceled. Negotiations were conducted with all bidders on the resolicitation, and award was made to Guardian Storage. This procedure was based on the urgent need to procure the services.

Timeliness

In its protest of December 4, 1981, Crystal contended that the cancellation of the IFB was improper because the resolicitation was "basically identical" to the canceled IFB except for an addition of 500 square feet of storage space with respect to one of the support service items. According to Crystal, this should have been the subject of a new separate procurement, rather than a compelling reason to cancel.

The agency report on Crystal's protest, received here on March 19, 1982, pointed out that Crystal had not addressed the above-stated actual bases for cancellation. Crystal, in subsequent comments on the report, for the first time contended that the initial IFB's award criteria were essentially sound. It argues that any IFB deficiencies regarding the basis for award were insignificant and that the key factor for each item of support service is the unit price for this requirements-type contract. The protester dropped the argument concerning storage space.

Guardian Storage claims that Crystal's contention that the evaluation criteria in the IFB were adequate to determine the awardee is untimely because the protester was fully aware of the actual bases for cancellation, but failed to protest until several months later when commenting on the report. We agree because, under our Bid Protest Procedures (4 C.F.R. § 21.2(b)(2) (1982)), the protest, stating the basis relied on for protesting, should have been filed no later than 10 days after receipt of the resolicitation in late November 1981, when the basis for protest was known or should have been known.

In this regard, the November 20, 1981, cancellation notice stated that the IFB "did not provide for consideration of all factors of cost to the Government." Further, the clear resolicitation revisions to the canceled IFB's evaluation criteria and estimates of work reasonably relate to the general basis for cancellation given in the notice. Moreover, Justice states that Crystal was informed of the bases for cancellation in a telephone conversation shortly after cancellation. Crystal denies that the telephone conversation so informed it. Despite this conflict, we find that the above circumstances show that Crystal was aware of the bases for resolicitation. Therefore, Crystal's argument for timeliness that it was unaware of the actual bases of cancellation until receipt of the agency report is rejected, and this portion of the protest is dismissed.

Bias

Crystal contends that the Acting Commissioner of the Immigration and Naturalization Service

"improperly and erroneously" reacted to hearsay information which attributed damage to Government facilities to Crystal under prior support service contracts pursuant to section 8(a) of the Small Business Act. Crystal charges that as a result of the hearsay information, it was targeted to be deprived of its then existing support service contract and any future competitively bid contract for the same services. In support of this charge, Crystal has submitted an affidavit which alleges that the Acting Commissioner told the contracting officer to "get rid" of Crystal.

The protester has the burden of affirmatively proving bias, and unfair or prejudicial conduct will not be attributed to procuring agency officials on the basis of inference or supposition. See A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 CPD 541. Where the written record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. Sperry Rand Corporation, 56 Comp. Gen. 312, 319 (1977), 77-1 CPD 77.

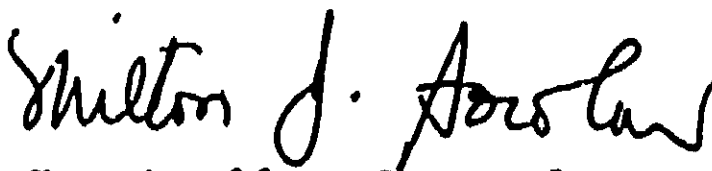
We find that Crystal has failed to establish that it was targeted to be deprived of any contract. Initially, we note that the contracting agency denies receiving advice to "get rid" of Crystal. With respect to Crystal's then existing support service contract, this contract was for fiscal year 1980 services with an option to renew that was limited to fiscal year 1981. Consequently, Justice had no existing contract or option for the fiscal year 1982 services involved in this procurement. As for this procurement, we see no basis for Crystal's complaint of discrimination since the protester failed to bid on the resolicitation.

Award During Protest

With regard to Crystal's objection to the award of the contract while the protest was pending, the record shows that Crystal's contract for the services was ending on December 31, 1981, and any interruption in these services would have caused extreme hardship for the agency. Under FPR § 1-2.407-8(b)(4)(i) (1964 ed. amend. 68), an award pending resolution of a protest

with our Office may be made where the items to be procured are urgently required. Crystal has provided us with no reasons to question Justice's determination to award a contract for the needed support services. Moreover, even if the award was contrary to this regulation, its legality would not be affected. See McQuiston Associates, B-199013, September 1, 1981, 81-2 CPD 192.

We dismiss the protest in part and deny the protest in part.

for 
Comptroller General
of the United States